

☐ EXPEDITE

☐ No hearing set

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Date: July 31, 2009

Time: 1:30 p.m.

Judge: Hon. Anne Hirsh

**SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

ROBERT EDELMAN, a Washington
citizen,

Petitioner,

v.

SECRETARY OF STATE,

Respondent.

No. 08-2-02317-3

**REPLY BRIEF OF PETITIONER
ROBERT EDELMAN**

I. INTRODUCTION

The Help America Vote Act (HAVA) requires the Secretary of State to maintain accurate voter registration records, but the Secretary's lax registration procedures and inadequate screening practices have resulted in placing inaccurate information into the voter registration database, which has led to illegal votes being cast by underage voters. Any occurrence of an illegal vote disenfranchises a legitimate voter and reduces that voter's confidence in the security of our electoral process.

II. ARGUMENT

A. The Secretary of State is Required to Maintain an Accurate Database.

The Help America Vote Act expressly requires the Secretary to maintain “accurate” voter registration records. 42 U.S.C. § 15483(a)(4). In his brief to this court, the Secretary avoids all mention of this requirement, stressing only his obligation to make a reasonable effort to remove ineligible registrants. Brief of Respondent at 6. The duty to maintain accurate voter records certainly includes the duty to remove ineligible registrants, but this is a non-exclusive obligation, as HAVA states:

Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote

42 U.S.C. § 15483(a)(4) (emphasis added). Thus, a violation of HAVA can occur outside of the non-exclusive provisions for file maintenance that HAVA offers.

Mr. Edelman has offered substantial evidence that the Secretary’s permissive registration procedures and file maintenance practices have resulted in inaccurate registrations and illegal votes. Thousands of underage individuals have been added to the voter database, with many showing up as “active” voters who receive ballots.¹ Opening Brief of Petitioner at 14. These inaccuracies have resulted in illegal, underage votes. *Id.*

¹ The Secretary asserts: “To the best of the Secretary of State’s knowledge, no county will accept a voter registration form submitted by an applicant younger than 17.” Brief of Respondent at 7, n.8. The Secretary made this claim to the Administrative Law Judge, which Mr. Edelman refuted by showing that since January 1, 2006, at least 19 individuals were registered at the age of sixteen. AR 0474-86.

1 Mr. Edelman has shown that the Secretary has not fulfilled the minimal duty the
2 Secretary is willing to embrace (of identifying and removing underage voters). Mr.
3 Edelman first notified the Secretary's Election Division of underage registrations in
4 December 2007. County auditors continued to add underage individuals to the voter
5 database, and even six months after the issue was brought to the Secretary's attention, 49
6 underage persons were registered as "active" voters. *Id.* The Secretary also failed in
7 February 2008 to prevent votes by known, underage registrants, only notifying county
8 auditors of their existence on election day. *Id.* at 19.²

11 As evidence of his compliance with HAVA, the Secretary offers the declaration of
12 Voter Service Manager David Motz, who stated his "present practice" was to daily
13 review the voter database for underage voters. Brief of Respondent at 11, n.16. Yet this
14 only establishes Mr. Motz' practice at the time—it was not a formal policy, the practice
15 could be changed or suspended, and the practice fails to *prevent* underage registrations.

17 Based on the evidence Mr. Edelman has offered, a violation of HAVA has
18 occurred and will unfortunately continue to occur.

19 **B. The Secretary Should Comply with HAVA by Rejecting Ineligible**
20 **Applications.**

21 The Secretary has speculated that rejecting underage voter applications "could
22 deny some individuals their right to vote guaranteed by the Washington Constitution."

25 ² The Secretary notes in the February 2008 primary only four illegal votes were cast out of a total
26 of 1,386,701. Brief of Respondent at 8, n.11. This statistical comparison is immaterial. The question is
whether the Secretary has maintained an accurate database. The four illegal votes could easily have been
avoided with simple, timely measures that the Secretary failed to implement. Furthermore, the Secretary
well knows that the outcome of an election can be influenced by only a few votes.

1 Brief of Respondent at 14. Mr. Edelman has proven the damage that occurs when
2 underage registrations are accepted, while the Secretary has offered no evidence of harm
3 from following such a procedure. Instead, Secretary grossly misstates Mr. Edelman's
4 position: "If, as Mr. Edelman wants, an applicant had to be 18 in order to even submit a
5 voter registration form, applicants whose eighteenth birthday fell within the 30 days prior
6 to the next election would be unable to register to vote because of RCW 29A.08.140."

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8 Brief of Respondent at 16.

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10 Mr. Edelman has never argued that all 17-year-olds should be prohibited from
11 registering to vote, and to characterize his position in this manner is misleading.³ He has
12 consistently defined an "underage registration" as "when an application is accepted from
13 a person who will not attain the age of eighteen before the next election." AR 0003. For
14 example, in his complaint, Mr. Edelman requested that the Secretary: "Advise county
15 auditors in writing that it is illegal to register an applicant who will not reach the age of
16 eighteen by the next election . . ." AR 0008 (emphasis added).

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18 Mr. Edelman's consistent position is that every *eligible* applicant should be given
19 the fullest opportunity to register and vote, while underage individuals should be invited
20 to register at such time when they will be eligible.

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22 The Secretary argues that Mr. Edelman's proposed procedure to reject underage
23 applications is "problematic" and could lead to disenfranchising some individuals. Brief
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26 ³ Mr. Edelman has not denied the apparent conflict between RCW 29A.08.210(10) (requiring the
applicant to confirm he or she is at least eighteen at registration) and RCW 29A.08.230 (requiring the
applicant to declare he or she will be "at least eighteen years old when I vote"). Regardless, neither of
these statutes permit the registration of a person who will not be 18 by the next election.

1 of Respondent at 14. In fact, the intent of Congress and the Washington Legislature is to
2 reject ineligible voters. HAVA advises ineligible applicants “do not complete this form,”
3 42 U.S.C. § 15483(b)(4)(A)(iii), and state law instructs agency employees to not provide
4 ineligible applicants with a registration form:
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6 If the applicant chooses to register or transfer a registration, the service
7 agent shall ask the following:

8 (a) “Are you a United States citizen?”

9 (b) “Are you or will you be eighteen years of age on or before the
10 next election?”

11 If the applicant answers in the affirmative to both questions, the agent shall
12 then provide the applicant with a voter registration form and instructions
13 and shall record that the applicant has requested to register to vote or
14 transfer a voter registration. If the applicant answers in the negative to
either question, the agent shall not provide the applicant with a voter
registration form.

15 RCW 29A.08.330(3) (emphasis added). *See also* RCW 46.20.155(1). This procedure is
16 not problematic; it fulfills the mandate to maintain an accurate registration database.

17 Attempting to justify his lax registration procedures, the Secretary argues that
18 HAVA has a policy of “over-inclusiveness” that would allow for the registration of
19 ineligible voters: “it appears that under-inclusiveness was more of a concern of HAVA
20 than over-inclusiveness. For example, HAVA requires that the state election system have
21 ‘[s]afeguards to ensure that eligible voters are not removed in error from the official list
22 of eligible voters.’” Brief of Respondent at 12-13. This language shows only that HAVA
23 was concerned with not *removing* eligible voters from the voter database *after* they had
24 properly registered. Nothing in HAVA suggests that election officers should have
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1 permissive procedures that allow ineligible individuals to register. In fact, HAVA
2 suggests the opposite.⁴

3 **C. The Secretary's Underage Registration Procedures Violate HAVA and are**
4 **Not Permitted Under State Law.**

5 Both HAVA and state law require that all voter registration information be entered
6 into the voter database on an "expedited basis at the time the information is provided" to
7 the election official. 42 U.S.C. § 15483(a)(1)(A)(vi) and RCW 29A.08.651(7). Mr.
8 Edelman argues that this requires election officials to process applications from eligible
9 persons and reject ineligible applications. Opening Brief of Petitioner at 21-23.

11 The Secretary, however, allows county auditors to accept underage applications,
12 either placing the application in a drawer, or adding the applicant to the registration
13 database under a "pending" status.⁵

15 The Secretary argues—without supporting data—that instances of underage
16 registrants should be discounted because "nearly all instances of underage voters
17 apparently being placed on the active voter database are illusory." Brief of Respondent at
18 9. The Secretary cites RCW 29A.09.110 as requiring county auditors to enter, as the
19 registration date, the date an underage applicant submits or mails the application, which
20 appears as an underage registration. The Secretary's position that underage voters can be
21 pending in this manner is incorrect for several reasons.

24 ⁴ See 42 U.S.C. § 15483(a)(5)(A) (requiring verification of applicant's identity); 42 U.S.C. §
25 15483(b)(2)(A) (requiring identification to register by mail); 42 U.S.C. § 15483(b)(4)(A)(iii) (advising
26 ineligible applicants to not complete a registration form).

⁵ The Secretary violates his own rules by pending underage voters. "Pending status" is defined as
"a voter registration record [that] is not yet complete" WAC 434-325-005(13). The rules do not
permit using pending status for completed applications from ineligible individuals.

1 First, nothing in HAVA or state law permits auditors to hold completed voter
2 applications from ineligible individuals, and the Secretary has cited no such authority.
3 Both, however, contemplate the rejection of ineligible voters, as discussed above. *See* 42
4 U.S.C. § 15483(b)(4)(A)(iii), RCW 29A.08.330(3), and RCW 46.20.155(1).
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6 Second, RCW 29A.09.110 provides specific steps for auditors to follow when
7 processing applications, and does not permit election officials to pre-date registration
8 applications from ineligible applicants. If the application form is not complete, the
9 auditor is to mail a deficiency notice to the applicant, but if the applicant fails to respond,
10 the name “shall not be placed on the official list of registered voters.” RCW
11 29A.09.110(1). If an application is complete, the date of mailing or the date of delivery is
12 used as the registration date. Once a complete form is received, the statute requires
13 auditors to send the applicant a voter registration card within forty-five days. RCW
14 29A.09.110(2). This statute does not permit auditors to hold applications from ineligible
15 applicants in a “no man’s land” until the person becomes eligible.
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18 Finally, assuming *arguendo* that underage registrations are “illusory,” the
19 Secretary has no explanation for how these illusory voter registrations have resulted in
20 underage individuals receiving ballots and casting votes. The Secretary has offered no
21 evidence to support his claim that underage registrations are a clerical illusion (e.g.,
22 evidence that underage applicants were activated after turning 18). Mr. Edelman,
23 however, has submitted substantial evidence that underage registrants are listed as
24 “active” and have voted in past elections.
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1 **D. The Election Assistance Commission Does Not Allow the Secretary to Omit**
2 **Information from the Voter Registration Application.**

3 HAVA requires that the federal voter registration form ask applicants if they are a
4 citizen of the United States, and whether they will be 18 on or before election day. 42
5 U.S.C. § 15483(b)(4)(A). Forms developed in compliance with this section are to include
6 the statement: “If you checked ‘no’ in response to either of these questions, do not
7 complete this form.” *Id.* § 15483(b)(4)(A)(iii). The Secretary relies on voluntary guidance
8 from the U.S. Election Assistance Commission (EAC) to argue that he need not include
9 the “do not complete” statement, specifically citing EAC’s statement: “HAVA does not
10 require states to redesign their state voter registration forms to include check-off boxes.”
11 Brief of Respondent at 18-20.⁶

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14 The Secretary’s position ignores the distinction between federal and state
15 registration forms. HAVA mandates the contents of voter registration forms used in
16 *federal* elections. A state is free to use its own form in non-federal elections. But
17 Washington has chosen to use one voter registration form for both state and federal
18 elections, and therefore the form must contain both the checkboxes and the “do not
19 complete” statement. *See* RCW 29A.08.220(1) (requiring state registration forms to
20 comply with federal requirements).

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26 ⁶ In the Secretary’s 2003 plan for implementation of HAVA submitted to the EAC, the proposed
mail-in registration form complied with HAVA. AR 0944. However, the Secretary subsequently
redesigned the form to omit the “do not complete” statement. AR 0945.

1 **E. Evidence From Past Elections is Admissible to Show the Secretary's**
2 **Noncompliance with HAVA.**

3 The Secretary attempts to discount evidence offered by Mr. Edelman by arguing
4 that HAVA did not become effective until January 1, 2006, and that the Secretary's rules
5 (WAC 434-263-020(4)) require a HAVA complaint to be filed within 30 days after the
6 certification of the election involved. Brief of Respondent at 9. The administrative rule is
7 not an evidentiary rule; it merely lays out the allowable scope of complaints. Mr.
8 Edelman's complaint is about a violation of HAVA which is occurring, and he is using
9 evidence from past elections to show how the violation has affected the integrity of the
10 voter rolls. For example, data from 2004 is valuable in demonstrating the likelihood that
11 underage registrations and votes will rise dramatically in a presidential election year.⁷
12 While it is true HAVA did not require Washington to implement a voter database until
13 January 1, 2006, Mr. Edelman is not using the prior data to show a violation of HAVA in
14 those early years, but to demonstrate that the Secretary is not screening the database for
15 underage registrations, as such registrations have not subsided since 2005.⁸
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19 **F. Attorneys Fees.**

20 If Mr. Edelman prevails, he will be prepared to argue that he is entitled to
21 attorneys fees and costs under the Equal Access to Justice Act, RCW 4.84.340-.360.
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24 ⁷ The Secretary says Mr. Edelman incorrectly argued a rise in the rate of underage registrations
25 since the 2006 adoption of the voter database. Brief of Respondent at 10,n.14. But a comparison of non-
26 presidential election years before and after adoption shows this: 1,024 underage registrations in 2001;
27 1,281 in 2002; 1,529 in 2003; 785 in 2005; 1,566 in 2006; and 1,548 in 2007. AR 0947.

28 ⁸ Since January 1, 2006, approximately 3,700 underage registrants have been added, 17 of whom
29 have voted.

III. CONCLUSION

The Secretary of State's Final Determination erroneously interpreted and applied the law, and is not supported by substantial evidence. RCW 34.05.570(3)(d) and (e).

Pursuant to RCW 34.05.574, Petitioner Edelman respectfully requests that the Court:

1. Set aside the Secretary of State's Final Determination dated September 12, 2008;
2. Make findings and conclusions identifying each violation or error in the Final Determination;
3. Order the Secretary of State to comply with the Help America Vote Act; and
4. Remand this action to the Secretary of State for modification of agency action.

Mr. Edelman also requests reasonable attorney fees and costs pursuant to RCW 4.84.350, and any other relief the Court deems just and reasonable under the circumstances.

DATED this 16th day of July, 2009.


EVERGREEN FREEDOM FOUNDATION

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